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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MELVIN E. TUTEN, *Petitioner*,

v.

UNITED STATES, *Respondent*.

On Writ Of Certiorari To The District Of Columbia Court Of Appeals

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REPLY BRIEF FOR THE PETITIONER

LINDA GILLESPIE STUNTZ
House Annex 2, Room 564
2nd & D Streets, S.W.
Washington, D.C. 20515
(202) 226-3400
Counsel for Petitioner

Of Counsel
ERWIN N. GRISWOLD
JONES, DAY, REAVIS & POGUE
1735 Eye Street, N.W.
Washington, D.C. 20006

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REPLY BRIEF FOR THE PETITIONER

I.

The Language Of Section 5021(a) and (b), Especially Section 5021(b), Is Far From Clear.

The application of the plain language rule has forever been complicated by the fact that "whether or not the words of a statute are clear is not always clear." *Barbee* v. *United States*, 392 F.2d 532 (5th Cir. 1968), *cert. denied*, 391 U.S. 935. Petitioner contends that the language of section 5021(b) should be construed in a manner that supports his claim. Respondent asserts that "the pertinent statutory language could not be clearer and it leaves no room for the construction urged by petitioner." (Br. 6). Respondent quotes the statute for the proposition that, "a youth offender who is placed on probation shall have his FYCA conviction automatically set aside if the sentencing court, 'in its discretion, inconditionally discharges such youth offender from probation *prior to the expiration of the maximum period of probation theretofore fixed by the Court.*' " (Br. 10, emphasis in original).

Petitioner does not take issue with this quotation of the language of the statute. He does, however, deny the accuracy of the conclusion drawn by respondent from the statutory language: "The wording of the statute itself thus compels the conclusion that a FYCA conviction will be set aside only when a court (or the Parole Commission) has discharged the youth offender *before* the expiration of *his* sentence, whether of probation or incarceration." (Br. 10-11, first emphasis in text, second emphasis added). This is *not* what the statute says. An important qualifer has been added, "his", and an important qualifer has been dropped, "maximum." Indeed, in no less than nine formulations of the meaning of section 5021, respondent never includes the word "maximum" even though it

appears in both 5021(a) and 5021(b), and in the legislative history excerpts cited by respondent at Br. 19-20, 23-24.[1]

Why does this matter? It is critical because petitioner and respondent agree that under section 5021, the set aside of a conviction occurs only when *early* unconditional discharge is granted.[2] The question is, what is early? Is an early discharge one prior to the end of the sentence initially imposed? Or is it one prior to the end of the longest sentence that could have been imposed (the determination reached by the Fifth Circuit in *United States* v. *Arrington*, 618 F.2d 1119, *cert. denied*, 449 U.S. 1086)? Or, is it one that occurs in less than six years from the date of the youthful offender's conviction or such longer adult sentence that may be imposed?

In this case, the answer to what is "early" depends on the meaning given to "the maximum period of probation theretofore fixed by the court" in section 5021(b). Petitioner and respondent agree that "the maximum sentence

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[1] In addition to p. 11, see also Br. 6, "the plain language of the statute, which unequivocally restricts the availability of set-aside relief to those YCA probationers who are unconditionally released *before* the expiration of the probationary term imposed on them"; p. 13, "prior to the expiration of the sentence imposed on them"; p. 16, "prior to the expiration of the sentence"; p. 19, "prior to the expiration of the sentence imposed on them"; p. 22, "prior to the expiration of the probationary term imposed on them"; p. 26, "prior to the expiration of the sentence imposed on them"; and p. 27, "prior to the expiration of the sentence imposed on them" and "prior to the expiration of the sentences imposed on them."

[2] Respondent ascribes to petitioner the position that the quality of the youth offender's response to treatment is irrelevant for purposes of section 5021. This is not true. As summarized at p. 25 of his Brief, petitioner's position is that the youth's discharge must be "unconditional and timely," i.e., earned prior to the expiration of the *maximum* sentence or term imposed or fixed.

imposed upon him," as it is used in section 5021(a), is six years or a greater adult-length sentence as would correspond with section 5010(b) and (c). (Pet. Br. 16-17, R. Br. 21). Section 5010(a), however, does not specify a "maximum" period of years for which probation may be imposed.

Respondent asserts that this does not matter because section 5021 "focuses not on whether the length of time served amounts to less than the statutory maximum, but rather on whether the offender, because of exemplary behavior, is discharged before the expiration of whatever sentence was imposed on him." (Br. 21). Yet, as the lack of any citation of authority for this contention suggests, the statute does not say "whatever sentence" or "sentence actually imposed." The statute uses the word "maximum," as one would expect in legislation establishing a scheme of more indefinite sentencing.

It is superficially plausible that the "maximum period of probation theretofore fixed by the court" is the period of probation initially imposed by the sentencing judge, as respondent presumes. This construction, however, could lead to bizarre results. In the District of Columbia, for example, upon the expiration of a term of probation, a court may discharge a probationer from further supervision or it may extend the probation. (D.C. Code § 24-104). If a youth offender were released prior to the end of that extended term of probation (whatever length it may be), would he receive the benefits of section 5021(b) as one discharged prior to the end of the "maximum period . . . theretofore fixed," even though a youth offender released at the end of the term of probation initially imposed would not qualify? Such a result would be contrary to the intent of those who devised section 5021 as a means of rewarding good behavior and providing a second chance to deserving youths. (Br. 17-18).

The Federal Probation Act, 18 U.S.C. § 3651, provides that the maximum probationary term that may be imposed for a federal crime is five years. It is plausible that this is the "maximum period" to which section 5021(b) refers.[3] *See* Br. 5, n.3. However, the District of Columbia Court of Appeals has determined that the Federal Probation Act does not apply to the District of Columbia. *Sanker* v. *United States*, 344 A.2d 304 (D.C.C.A. 1977). What then is the "maximum period of probation theretofore fixed by the court" in the District of Columbia? The six-year maximum term provided in section 5010(b) and section 5017(c) of the FYCA would seem to be the best benchmark for measuring whether there has been an "early" discharge from Federal Youth Corrections Act probation so as to qualify the youth for the set aside of his conviction pursuant to section 5021(b).

In summary, a genuine question exists as to when an unconditional discharge must be granted in order to set aside the conviction of a youth offender under section 5021(b). The legislative history cited by respondent at pp. 22-25 does not address, let alone resolve, this question, nor do the decisions cited by respondent at p. 15.[4] More-

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[3] Section 5023(a) of the Federal Youth Corrections Act preserves all court authority under the Federal Probation Act.

[4] The decision in *Nast* v. *United States*, 415 F.2d 338 (10th Cir. 1969) did not deal with the question of when conviction set aside occurs under section 5021. Rather, the court held that a youth offender who escaped while waiting transfer to a federal youth facility may be given a sentence for the escape, consecutive to his FYCA sentence. The cases of *United States* v. *Bronson*, 449 F.2d 302 (10th Cir. 1971), *cert. denied*, 405 U.S. 949 and *Cunningham* v. *United States*, 461 F.2d 995 (9th Cir. 1972) both involved the adequacy of information provided to youth offenders who volunteered guilty pleas. Both courts described the set-aside benefits of section 5021 as being unavailable to a youth offender who is held for "the maximum sentence"

over, respondent's view that the word "maximum" equals "actual" or "whatever" leads to respondent's basic misunderstanding of *United States* v. *Arrington*.

II.

The Fifth Circuit in *United States* v. *Arrington* Determined That "The Maximum Sentence" Referred To In Section 5021(a) Is The Maximum Sentence Which Could Have Been Imposed Under The Federal Youth Corrections Act.

Respondent describes the holding of the Fifth Circuit in *United States* v. *Arrington* as, "every committed youth

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(449 F.2d at 305, 461 F.2d at 996). Similarly, in *Cox* v. *United States*, 473 F.2d 334, 336 (4th Cir.) (en banc), *cert. denied*, 414 U.S. 869 (1973) and *Tatum* v. *United States*, 310 F.2d 854, 855-856 (D.C. Cir. 1962), the courts described section 5021 as providing for the automatic setting aside of the conviction of a youth offender who is unconditionally released before the expiration of the "maximum" term. *See also Watts* v. *Hadden*, 651 F.2d 1354, 1379 (10th Cir. 1981) (citing *Arrington* in support).

In *Doe* v. *Webster*, 606 F.2d 1226, 1236-1237 (D.C. Cir. 1981), the court refers to the same legislative history discussed in Respondent's Brief (pp. 19-20). Again, the key phrase used by the court to describe when unconditional release will trigger the set aside of a conviction is "before the end of their maximum term." The decision of the court in *Doe* does not set out facts sufficient to determine whether or not the offender in that case was released prior to the expiration of any given term of probation.

Finally, in *Preston* v. *McCall*, 542 F. Supp. 249, 251 (E.D.N.C.), *aff'd*, 688 F.2d 834 (4th Cir. 1982) (table), the court determined that a 1973 bank robbery conviction could be considered for purposes of parole for later offense because the offender had completed a term of imprisonment. In doing so, the court disapproved of *Arrington*, describing the holding in the case as, "expunction of a committed youth offender conviction was automatic upon unconditional discharge at the end of the maximum sentence." (542 F. Supp. at 251.) As will be discussed *infra*, this is the same interpretation of *Arrington* as that adopted by Responent. It is not, however, what the Fifth Circuit held in *Arrington*.

offender is entitled, upon his eventual unconditional discharge, to a set-aside of his conviction under 18 U.S.C. § 5021(a)." (Br. 6). This reading of the opinion is in error, however, because it ignores the court's discussion of the "broad range of sentencing options available" to the trial court, as well as the court's determination that, "the trial court in Arrington's case would have taken into account the mandatory discharge provision before choosing the appropriate sentence." 618 F.2d at 1123, Pet. 7, Br. 21-22. Respondent may disagree with the definition of "the maximum sentence imposed" adopted by the Fifth Circuit, but the Fifth Circuit did not, as Respondent contends, "simply misread the statute, overlooking the phrase, 'before the expiration of the maximum sentence imposed upon him.' " (Br. 7; *see also* 16). The court determined in *Arrington* that the "maximum sentence" was the longest sentence that could have been imposed under the FYCA. Consequently, the unconditional discharge that Arrington received following his completion of a sentence less than that which could have been imposed entitled him to the benefits of section 5021(a).[5]

Petitioner submits that the construction of section 5021(a) adopted by the court in *Arrington* best advances the policy underlying the Youth Corrections Act. However, as respondent notes (Br. 26), petitioner's case does not depend upon approval of the *Arrington* court's definition of the "maximum" sentence for purposes of 5021(a). Petitioner maintains that the "maximum period of probation theretofore fixed by the court" under section 5021(b)

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[5] In candor, petitioner must agree with respondent that this reading of section 5021(a) is not consistent with the language of the statute specifying that the "maximum" sentence is that which was imposed, not that which could have been imposed.

is a longer term than the two year term that he served and after which he was granted an unconditional discharge. In other words, rather than contending that he could have been given a longer sentence, and therefore that the completion of the sentence that he was given triggered the automatic set aside of his conviction, petitioner contends that when he was sentenced under section 5010(a), there was actually imposed a "maximum" period of probation longer than the two year term that he served. Thus, his conviction was set aside upon his unconditional discharge.

III.

Administrative Interpretation Of Section 5021 Does Not Resolve The Question Of What Is Early Unconditional Discharge From Probation, But Does Demonstrate The Breach Of Proper Procedure In This Case.

The Parole Board regulations and the Probation Officers Manual cited at pp. 27-29 of Respondent's Brief refer to conviction set aside as occurring upon the grant of unconditional discharge "prior to the expiration of his maximum term" and "prior to the expiration of the maximum period of probation." Inasmuch as no definition of "maximum term" or "maximum period of probation" is provided, this listing of procedures does not offer a basis for judging whether petitioner's discharge was or was not prior to the expiration of "the maximum period of probation."

These administrative practices do confirm that petitioner, whose case was never brought before the sentencing judge prior to the expiration of his initial term of probation (Br. 7-8, n.6, 12 n.8), was denied the benefit of the exercise of judicial discretion contemplated by the

Federal Youth Corrections Act.[6] Because petitioner's probation officer did not submit a report to the sentencing judge 90 days or even 30 days prior to the expiration of his two-year term of probation, there was no opportunity for petitioner to be discharged prior to the end of the term of probation initially imposed. To deprive petitioner of the benefits of section 5021(b) under these circumstances is to ignore reality.

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[6] Respondent asserts that this question is "not properly before the Court." (R. Br. 12-13, n.9 and 30) Petitioner disagrees for three reasons. First the facts regarding the failure of the probation department to perform as it should have in 1973 only recently became known to petitioner. This discovery of new facts is not the same as seeking to press a procedural question regarding a trial court ruling which could have been raised below but was not, the situation before the Court in *United States* v. *Lavasco*, 431 U.S. 783, 788-89, n.7 and *Lawn* v. *United States*, 355 U.S. 339, 362-363, n.16. Second, even though the nonfeasance involved in this case was not known when the case was before the District of Columbia Court of Appeals, that court was aware that the rule requiring probation officers to report to the sentencing judge at least 30 days before a probationary term expired was frequently ignored. Remarks of Chief Judge Newman, (tape on file with office of the Clerk). Third, this issue is "fairly included" in the question posed by the Petition since it directly affects whether or not petitioner's prior FYCA conviction is an appropriate basis upon which to impose a recidivist penalty.

If petitioner's position that his FYCA conviction has automatically been set aside or, in any event, cannot be used to trigger a recidivist penalty, is determined to be in error, a motion before the trial court to exercise its discretion nunc pro tunc, as respondent suggests, may be appropriate.

IV.

Nothing In The Legislative History Or The Underlying Policies Of The Federal Youth Corrections Act Sanctions The Use Of Petitioner's FYCA Conviction As The Basis Upon Which To Impose A Recidivist Penalty.

Respondent acknowledges that in enacting the FYCA, Congress sought to provide a "special program of treatment and supervision." (Br. 32). The unique character of Federal Youth Corrections Act convictions was emphasized recently by the United States Court of Appeals for District of Columbia Circuit when it determined that a youth sentenced under the FYCA could be held for a term longer than an adult would receive for the same offense because of the Youth Act's "different purpose (its' basic theory . . . is rehabilitative) and effect (the 'conditions and terms' of confinement) are different . . ." *United States* v. *Donelson*, No. 81-2118 (December 7, 1982), slip op. p. 3. Respondent neverthless contends that FYCA convictions not set aside pursuant to section 5021 should be treated just like any other convictions for purposes of recidivist penalties. However, no showing is made as to how such use of FYCA convictions like petitioner's, where the youth responded favorably to treatment and received an unconditional discharge, serves the purposes of the FYCA or recidivist statutes. (Br. 25-27).

Contrary to respondent's claim, no state court has ever held that an FYCA conviction like petitioner's may be used to trigger increased penalties under state second offender statutes. In *State* v. *Pacheco*, 121 Ariz. 88, 89-90, 588 P.2d 830, 832-833 (1978), the court determined that Pacheco was "in no position to challenge the use of his Youth Act conviction under the recidivist provisions . . . since he neither alleged nor proved that he had completed his sentence under the Youth Act nor that he had ever been assured a certificate of vacation of conviction. . . ."

Indeed, the court noted that at the time of Pacheco's arrest, he was in federal custody for violating the parole which was a part of his Youth Act sentence.

A similar situation was before the court in *People* v. *Celli*, 430 N.Y.S.2d 949 (Westchester County Ct. 1980). Celli had violated the terms of her Youth Act sentence and had not been granted an unconditional discharge at the time she was charged with the subsequent offense.[7]

In *State* v. *Cummings*, 607 S.W.2d 685, 688 (Mo. 1980), the court refused to consider the argument that sentencing under the Youth Corrections Act is comparable to a suspended sentence in Missouri practice and does not amount to a conviction for purposes of Missouri's second offender law because the argument had not been raised at trial.[8]

Respondent rightly points out that the enhanced penalty provision of D.C. Code section 22-3204 was added shortly after the FYCA was made applicable to the District of Columbia. However, there is not a single reference in the debate or legislative history of that provision

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[7] Celli had initially been placed on probation under 5010(a) for three years. After serving only about three months of that probation, it was revoked and she was committed to the custody of the Attorney General pursuant to 5010(b). Celli was paroled after three years pursuant to 5017(c), but at the time of this case, Celli was in the process of having her parole revoked and a federal warrant had been filed, 430 N.Y.S.2d at 950-951. The situation addressed by the court in *Celli* is thus far different than the instant case.

[8] In dicta the court added that Cummings had not shown that he was entitled to receive the benefits of section 5021. However, the facts set forth in the decision do not indicate either the FYCA sentence Cummings had been given or whether he had ever received an unconditional discharge.

regarding the use or non-use of FYCA convictions such as petitioner's to trigger the recidivist penalty.[9]

There is no indication that Congress spoke to, or even anticipated, the question posed by this case in the development of either the FYCA or the District of Columbia Law Enforcement Act. The Court, therefore, should interpret the two statutes in a way that advances the underlying purposes of both and avoids the harsh result approved by the court below. (*See* Br. 27-29).

The adoption of petitioner's position—that an FYCA conviction for which an offender serves a short term of probation and is unconditionally discharged should not be used as the basis upon which to impose a recidivist penalty—furthers the FYCA's statutory purpose of giving deserving youth offenders a second chance. It also serves the purpose of Congress in providing the enhanced penalty under section 22-3204 insofar as that felony penalty will be targeted at those incorrigible offenders who by their records merit more severe punishment.

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[9] *See* 99 Cong. Rec. 6421-6423; 6631-6633 (1953); H.R. Rep. No. 514, 83d Cong., 1st Sess. 3-4 (1953); S. Rep. No. 364, 83d Cong., 1st Sess. 3-4 (1953); H.R. Rep. No. 3244, 81st Cong., 2d Sess. (1951); H.R. Rep. No. 538, 82d Cong., 1st Sess. (1951); and S. Rep. No. 1989, 82d Cong., 2d Sess. (1952).

CONCLUSION

For these reasons stated in Petitioner's principal brief, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

LINDA GILLESPIE STUNTZ
House Annex 2, Room 564
2nd & D Streets, S.W.
Washington, D.C. 20515
(202) 226-3400
Counsel for Petitioner

Of Counsel
ERWIN N. GRISWOLD
JONES, DAY, REAVIS & POGUE
1735 Eye Street, N.W.
Washington, D.C. 20006